January 21, 2003

Ms. Marlene H. Dortch
Secretary
Federal Communications Commissioner
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte*: Review of the Unbundling Obligations of Incumbent Local Exchange Carriers--CC Docket No. 01-338; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996--CC Docket CC No. 96-98; Deployment of Wireline Services Offering Advanced Telecommunications Capability--CC Docket No. 98-167

Dear Ms. Dortch:

This letter responds to a notice of a Verizon *ex parte* meeting with Commissioner Abernathy and M. Brill on January 9, 2003[1] and an *ex parte* presentation filed by Verizon on January 10, 2003, which consists of a letter from Michael E. Glover and Susanne Guyer of Verizon to William F. Maher, Chief, Wireline Competition Bureau.[2] With respect to the January 9 *ex parte*, Verizon indicates that the October 16, 2002 written *ex parte* presentation of William Barr[3] provided the basis for discussion of Verizon's policy positions in the above captioned dockets.

In both its January 9 meeting with Commissioner Abernathy, and its January 10 *ex parte* presentation, Verizon again repeats the tired refrain it has endlessly made over the last twelve months, that "UNE-P impedes facilities investment"[4] by both the incumbent local exchange carriers (ILECs) and the competitive providers (CLECs).[5] Verizon's solution to this alleged "problem"? "Remove circuit switching from UNE list, price transition UNE-P to resale, and eliminate pick and choose."[6] Neither Verizon's characterization of the "problem," nor its proposed "solution" has evolved over the past year, even in the face of extensive documentation that has directly refuted the validity of Verizon's claims regarding the relationship between UNE-P and investment.[7] Further, Verizon has failed to address in any substantive way the transition proposals in this proceeding that would lead to facilities deployment by

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1 Hereinafter "Jan. 9 *ex parte*."

2 Hereinafter "Jan. 10 *ex parte*."

3 *See* Verizon *ex parte*, Oct. 16, 2002 (Letter From William Barr, Verizon to Chairman Powell) ("Barr Letter").

4 *See* Jan. 9 *ex parte*, 10.

5 *See* Barr Letter, 18.

6 *See* Jan. 9 *ex parte*, 9.

7 *See* Z-Tel *ex parte*, CC Docket Nos. 01-338, 96-98, 98-147 (Dec. 16, 2002); *see also* http://www.telepolicy.com/twotest.pdf (July 2002).

competitors.[8] Below is provided a point by point rebuttal to the issues raised in Verizon's letter of January 10, 2003.

First, Verizon argues that because some CLECs are serving customers over their own switches in a number of markets, CLECs are therefore not impaired without access to the UNE-P.[9] Verizon has been making this argument for years. In fact Verizon has been trotting out this oldie since the *UNE Remand* proceeding, where the Commission properly rejected it,[10] as it should here. Verizon's single-minded focus on merely counting the number of switches deployed by CLECs says nothing about whether a CLEC that is seeking to serve the mass market will be impaired without access to the UNE-P.

What Verizon seems either unwilling or incapable of comprehending or acknowledging is that the CLEC deployed switches that Verizon is counting are utilized primarily to provide large businesses with digital services (i.e. DS-1 and above) in concentrated geographic areas. UNE-P carriers need access to the UNE-P in order to provide voice grade services over DS-0 loops. In this proceeding neither Verizon, nor any other ILEC, has demonstrated that any of the CLEC switches it has identified are capable of providing the functionality required for CLECs to serve the mass market. In addition, as numerous other parties to this proceeding have pointed out, Verizon's attempts to cite "intra-modal" sources of competition have no place in the impairment analysis that the *USTA* decision requires the Commission to undertake.[11]

Second, Verizon argues that the Act and the *USTA* decision require the Commission to immediately eliminate the UNE-P and circuit switching in light of Verizon's novel interpretation of the impairment test, which it now suggests requires the Commission to merely ask if "facilities have been significantly deployed on a competitive basis."[12] In offering this test, Verizon completely misapprehends what *USTA* requires. Verizon argues that *USTA* simply says that if a market is "subject to competitive entry" then competitors are not impaired within the meaning of the Act.

Contrary to the twisted interpretation put forth by Verizon in the January 10 *ex parte*, the *USTA* court did not require the Commission to find that there is no competitive impairment if a market is "subject to competitive entry." Rather, the *USTA* decision merely rejected the Commission's *national application* of the impairment framework.[13] Specifically, *USTA* held that the Commission paid too little attention to specific fact-finding in the *UNE Remand Order* and took the Commission to task for adopting "a uniform

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8 *See ex parte* Letter from Rebecca Sommi, Vice President, Broadview Networks, Inc. *et al.* to Chairman Michael K. Powell, CC Docket Nos. 01-338, 96-98, and 98-147, dated October 31, 2002 (setting forth the proposed "UNE-P to UNE-L Migration Plan"); *see also ex parte* Letter from Rebecca Sommi, Vice President, Broadview Networks, Inc. *et al.* to Secretary Marlene H. Dortch, CC Docket Nos. 01-338, 96-98, and 98-147, dated December 20, 2002 (setting forth the proposed "Central Office ULS Transition Plan").

9 *See* Jan. 10 *ex parte*.

10 *See UNE Remand Order*, 15 FCC Rcd. at 3810.

11 *See USTA v. FCC*, 290 F.3d 415, 422 (D.C. Cir. 2002) ("*USTA*").

12 *See* Jan. 10 *ex parte*, 2.

13 *See USTA* at 425. The *USTA* court prefaced its rulings by stating: "We note at the onset the extraordinary complexity of the [Federal Communications] Commission's task. Congress sought to foster competition in the telephone industry, and plainly believed that merely removing affirmative legal obstructions would not do the job. It thus charged the Commission with identifying those network elements whose lack would 'impair' would-be competitors' ability to enter the market, yet gave no detail as to either the kind or degree of impairment that would qualify." (footnotes omitted). *See also* Commission's Petition for Rehearing or Rehearing En Banc of *USTA v. FCC* at 10-11 (filed July 8, 2002).

national rule . . . without regard to the state of competitive impairment in any particular market."[14] Thus, Verizon's proposed elimination of the circuit switching element and the UNE-P on a national basis, without regard to the state of competitive impairment, would be similarly flawed.

Third, in the event the Commission decides not to eliminate the UNE-P on a nationwide basis immediately, Verizon advocates "transitioning" residential UNE-P customers to the state established resale rates over a twelve (12) month period. Under Verizon's "transition" plan, embedded bases of UNE-P customers and customers added within the first six months of the Commission's order would be subject to the transitional rates.

Verizon's "transition" plan is inherently flawed for several reasons. First and foremost, the transition plan assumes that UNE-P and resale are interchangeable. In fact, the Act imposes two separate and distinct duties upon ILECs to provide both means of entry. Section 251(c)(3) requires that ILECs provide elements and combinations thereof (i.e. the UNE-P) and Section 251(c)(4) requires that ILECs offer for resale at wholesale rates, any telecommunications service. Accordingly, the difference between resale and UNE-P could not be clearer.[15]

The second fatal flaw of the Verizon transition plan is that the rates it proposes are not compliant with TELRIC. The Act requires network elements, including the network elements comprising the UNE-P, to be set at prices that reflect the incumbents' economic cost of providing those elements.[16] The Verizon transition plan contains no such requirement, and accordingly, would violate the Act.

Third, the "transition plan" proposed by Verizon is completely at odds with the goal that Verizon has been paying lip service to in this proceeding: that is, moving UNE-P lines to UNE-L arrangements. But by requiring a flash cut from UNE-P to resale, the Verizon plan ensures that carriers would not have the financial wherewithal to migrate their facilities. Once carriers were forced to become resellers, any revenue that might have been available to transition to UNE-L over time will have disappeared.

To the extent the Commission would adopt Verizon's inherently flawed plan, it would ensure that UNE-P carriers either become resellers indefinitely, or would drive UNE-P carriers from the marketplace. As evidenced by the recent statements of Mr. Lawrence T. Babbio, Jr., Verizon's Vice-Chairman and President, Telecom, Verizon's transition plan is most definitely not designed to encourage facilities-based competition, but to eliminate competitors. Speaking recently at an analyst conference, Mr Babbio stated: "I have been relatively polite in saying we want to address this issue. I would want to say, **'Kill those little suckers.'** (emphasis added) That's how we feel about UNE-P."[17] Verizon's transition plan is the perfect solution if one is to consider Verizon's real objective in this proceeding.

But one of the key "advantages" touted by Verizon of eliminating UNE-P on a flash cut basis, "restoring investment incentives for incumbents and competing facilities based providers," would not be realized.[18] Outside observers of this proceeding, including several Wall Street analysts, have recently indicated that

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14 *USTA*, 290 F.3d at 421-22.

15 *See ex parte* Letter from Broadview, CC Docket Nos. 01-338, 96-98, 98-147 (Nov. 11, 2002), thoroughly details the technical and operational deficiencies of resale versus UNE-P.

16 *See Local Competition Order*, 11 FCC Rcd. 15499, ¶ 679 (1996).

17 *See* Telecommunications Reports Daily (Jan. 7, 2003) http://www.tr.com/online/trd/2003/td010703/index.htm

18 *See* Jan. 10 *ex parte*, 3.

the elimination of the UNE-P would not result in increased investment in facilities A recent UBS Warburg report estimated that the elimination of UNE-P would, in fact, only result in an increase of incumbent local carriers' capital expenditures of approximately $400 million dollars, according to analyst Nikos Theodosopoulos.[19] When viewed against the estimated ILEC 2003 capital expenditures of $17 billion this year, a $400 million boost is minimal,[20] the report stated.

Theodosopoulos expressed doubt as to whether the elimination of UNE-P would spur investment spending by the two largest users of UNE-P, AT&T Corp. and WorldCom, Inc., which have used UNE-P to move aggressively into local-service markets. "We would view the termination of UNE-P as virtually ending the involvement of the IXCs in the local voice market rather than a new investment cycle for equipment companies," he stated in his report.[21]

Given this analysis—no serious increase in investment by either ILECs or CLECs if UNE-P is curtailed—the ongoing depression across the entire telecom sector and the lack of access to anything but revenue driven capital,[22] Verizon's proposed solution to "encourage" investment only by squeezing out more revenue for itself at the expense of the new entrants and consumers is indeed troubling. It is a proposal which most certainly does not respond to the FCC's desire to have more facilities-based competition.

Fourth, Verizon submits that any transition should be narrowly tailored to address a legitimate regulatory concern and limited in duration. Broadview, Eschelon and Talk America agree completely, and accordingly, urge the Commission to adopt the transition plan which we proposed initially on October 30, 2002.[23] Indeed, in the past, the Commission has allowed for reasonable transition times in order to avoid revenue shock for a particular industry segment.[24] However, the 12 month timeline proposed by Verizon is completely unreasonable, has no support for it in this record, and most importantly, totally ignores the entire issue of CLEC impairment.

Fifth, Verizon again attempts to explain why CLECs would not suffer impairment as a result of Verizon's hot cut process or the exorbitant cost thereof. In a January 15, 2003 *ex parte*,[25] the undersigned addressed all of the baseless arguments raised by Verizon in its December 23, 2002 *ex parte*, which it reiterates in its January 10 *ex parte*.

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19 *See "Telecom Equipment: Impact of Potential UNE-P Relief on Capex Estimates,"* UBS Warburg Global Equity Research, Jan. 7, 2003. ("UBS Report").

20 UBS Report

21 UBS Report, 2.

22 "Revenue driven capital" indicates that there are already customers with sufficient revenues that justify the capital investment. This is the opposite investment strategy of the early CLEC years of "build it and they will come."

23 *See ex parte* Letter from Rebecca Sommi, Vice President, Broadview Networks, Inc. *et al.* to Chairman Michael K. Powell, CC Docket Nos. 01-338, 96-98, and 98-147, dated October 31, 2002 (setting forth the proposed "UNE-P to UNE-L Migration Plan").

24 *See Intercarrier Compensation for ISP-Bound Traffic*, FCC 01-131. *See also Access Charge Reform, CC Docket No. 96-262,* First Report and Order, 12 FCC Rcd 15,982, 16002, FCC 97-158, para. 46 (1997) ("We are concerned that any attempt to move immediately to competitive prices for [certain ILEC access] services would require dramatic cuts in access charges for some carriers. Such an action could result in a substantial decrease in revenue for incumbent LECs, which could prove highly disruptive to business operations, even when new explicit universal support mechanisms are taken into account.").

25 See *ex parte* Letter from Rebecca Sommi, Vice President, Broadview, *et al.* Docket Nos. 01-338, 96-98, 98-147 (Jan. 15, 2003) (Responding to Verizon's Jan. 9 and Jan. 10 *ex partes.*)

As the undersigned have already stated, it is clear from the record that Verizon has failed to demonstrate that they have the capability to perform the large volumes of cutovers that would be necessary to support widespread mass market entry. This fact is illustrated by the existence of a newly opened New York Commission proceeding to examine the problem of "bottlenecks in the current process for providing hot-cuts" and the changes that will be necessary to handle larger volumes of hot cuts in the future.[26] The record in these dockets makes clear that under existing hot cut methods and procedures, there is no possible way that Verizon could manage the hot cut volumes that would coincide with the elimination of UNE-P, nor is there any evidence on this record to support Verizon's claim that the hot cut process can support large volumes of hot cuts. Moreover, the undersigned's January 15 *ex parte* explains that Verizon's $36 hot cut charges are temporary rates for non-recurring charges, and the temporary rates expire in just over a year.

Verizon also argues that CLECs would not be impaired by being required to backhaul traffic from remote central offices to their own switches, and indeed, argues that CLECs have the upper hand over ILECs because their switches can serve a larger geographic area. As was pointed out above, Verizon's logic on this point does not hold up. Verizon assumes, incorrectly, that the stand alone switches deployed across the country would be available to serve residential customers over DS-0 loops. As the record makes clear, however, the mass market cannot economically be served using these switches.

Sixth, Verizon argues that the transition plans proposed by other carriers in this proceeding are designed merely to preserve the UNE-P indefinitely, and that doing so would be contrary to the Act.[27] Specifically, Verizon attacks "geography specific" transition plans, which would require incumbents to demonstrate to state commissions that carriers are not impaired without access to particular elements in particular geographic regions as a "thinly veiled effort to perpetuate the availability of the UNE-platform indefinitely by initiating a protracted new round of litigation."[28]

As discussed above, however, a granular, geographic specific approach to the impairment analysis is precisely what the D.C Circuit required of the Commission in the *USTA* decision. The fatal problem with the *UNE Remand Order*, according to the *USTA* court was that "[a]s to almost every element, the Commission chose to adopt a uniform national rule . . . without regard to the state of competitive impairment in any particular market."[29] "The Commission has loftily abstracted away all specific markets."[30] Accordingly, the *USTA* decision in no way rejected the Commission's impairment framework, only its national application.[31] The transition plan proposed by the undersigned both addresses the concerns of the *USTA* court and will genuinely expand facilities deployment.

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26 *See Order Instituting Proceeding*, New York Public Service Commission Case 02-C-1425 Proceeding on Motion of the Commission to Examine the Process, and Related Costs of Performing Loop Migrations on a More Streamlined (*e.g.* Bulk) Basis (Nov. 22, 2002) ("New York Loop Migration Proceeding").

27 *See* January 10 *ex parte*, 7.

28 *See* January 10 *ex parte*, 8.

29 *USTA* at 422.

30 *Id.*, 423.

31 *Id.* at 425.

Respectfully submitted,

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Cc:
Chairman Powell
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Commissioner Abernathy
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